

¹ The parties agreed that the depositions of claimant and Mina McGinnis are part of the record. R.H. at 5-6. The ALJ's Award did not list the deposition of Dr. George Fluter as part of the record. However, Dr. Fluter's deposition and his opinions were discussed in the Award and have been considered by the Board.

Respondent contends: (1) claimant's accidental injury did not arise out of and in the course of her employment with respondent; (2) the employer/employee relationship did not exist between claimant and respondent when the accidental injury occurred; (3) the ALJ erred in computing claimant's average weekly wage; and, (4) the ALJ erred in determining the nature and extent of claimant's disability.

Respondent urges the Board to find the claim not compensable and deny claimant any benefits under the Act. Claimant maintains the ALJ's findings were correct and the Award should be affirmed.

The issues presented to the Board for review are:

(1) Did claimant's accidental injury arise out of and in the course of her employment with respondent?

(2) Did the employer/employee relationship exist between the parties when claimant's accidental injury occurred?

(3) What is claimant's average gross weekly wage?

(4) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant received a letter from respondent dated December 13, 2007, indicating respondent was "pleased you [claimant] have accepted a position with us."² The letter stated claimant's hire date was "8:00am Thursday December 20, 2007."³

Claimant, who was a registered medical diagnostic sonographer, was to perform the job of ultrasound technician in respondent's radiology department. Claimant was hired to work on an "as needed" or prn basis and she was to earn \$23.50 an hour with no benefits. The letter refers to claimant as "employee" and respondent as "employer." However, the letter made clear claimant's hire date would be established only when she had completed the new hire paperwork. Claimant was scheduled to complete the new hire paperwork; receive instruction about HR policies and procedures, benefits, employee health and education; and undergo systems access and training, when she was to report for work on Thursday, December 20, 2007, at 8 a.m.

² R.H. Trans., Cl. Ex. 1 at 1.

³ *Id.*

Claimant underwent a mandatory pre-employment health screening at respondent on Monday, December 17, 2007, at 10:15 a.m.

Claimant went to respondent's facility on Wednesday, December 19, 2007, solely because she wanted to familiarize herself with the equipment she would be operating. Claimant knew she would be placed on prn status beginning Friday, December 21, 2007. Before going to CKMC on December 19, 2007, claimant talked to a co-employee named Lacy about coming to the hospital before she was scheduled to report to the hospital on December 20. Evidently, Lacy did not object to claimant's plans. Lacy was just another technician with no supervisory responsibilities vis-a-vis claimant. Claimant's supervisor was to be someone named Jim. Claimant did not discuss with Jim her intentions to go to respondent's radiology department before her scheduled start date. Claimant did not discuss her intentions with respondent's HR department.

Claimant had no personal reason to report to work ahead of schedule. Claimant's action in going to the hospital a day early may have produced some benefit to respondent.

Claimant arrived at respondent's facility a little after 8 a.m. on December 19, 2007, one day before she was scheduled to commence work for respondent. Claimant parked in respondent's parking lot and, as she walking to a building entrance, she slipped on ice and fell. Claimant fell about 20 feet from the entrance. As a consequence of the fall, claimant sustained displaced fractures to her right distal tibia and fibula. The fractures were treated surgically by Dr. Randall Hildebrand the same day.

On September 20, 2011, Dr. George Flutter, a board certified specialist in physical medicine and rehabilitation, examined and evaluated claimant at the request of claimant's counsel. Based on the *AMA Guides*,⁴ Dr. Flutter opined claimant sustained a 7% permanent functional impairment to the right ankle due to mild range of motion deficits. The doctor also rated claimant's right lower extremity at 3% due to her plantar fasciitis. Using the Combined Values Chart, Dr. Flutter concluded claimant's overall functional impairment was 10% to the right lower leg.

Dr. John Estivo, a board certified orthopedic surgeon, evaluated claimant on March 16, 2012, at the request of respondent's attorney. The doctor reviewed claimant's medical records and took a history. Upon physical examination, Dr. Estivo found claimant's right lower extremity incisions were healed and range of motion was fairly good with mild tenderness over the site of the fibula fracture. No other abnormalities were found. Based on the *AMA Guides*, Dr. Estivo opined claimant sustained a 7% permanent functional impairment to the right lower leg.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) provides:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2007 Supp. 44-508(g) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

Whether an accident arises out of and in the course of the worker's employment depends on the facts of the particular case.⁶

ANALYSIS

The Board concludes the relationship of employer/employee did not exist between respondent and claimant when claimant's accidental injury occurred. The Board further

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁶ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

concludes claimant's accidental injury did not occur in the course of her employment. The Board accordingly reverses the ALJ's Award.

The employment relationship is based on the existence of a contract. A contract of employment is "made" when and where the last act necessary to its formation is done.⁷

Claimant's "official start day" was December 20, 2007, one day after claimant's accidental injury. Claimant's exhibit 1 in the regular hearing transcript consists of a letter from Denise Schreiber, a Human Resources Generalist for respondent, to claimant dated December 13, 2007. The document is ambiguous, but several conclusions can be drawn from its language:

1. The purpose of the letter was to confirm respondent's offer of employment and to inform claimant of the additional steps she had to take before claimant could commence her position of Ultrasound Tech.

2. Claimant's "hire date" was "8:00am Thursday December 20, 2007 (ckmc room 400)."

3. The letter specifically informed claimant:

New partner paperwork is scheduled for completion on December 20, 2007. Please come to the Human Resources Department at this time. The day that you complete your new hire paperwork becomes your **hire date**. . . . Completion of new partner paperwork is required before you can begin working in your unit. Topics covered include Human Resource policies and procedures, benefits, employee health, education, time to complete new hire paperwork and systems access and training. (emphasis in original)⁸

In *Lang*,⁹ a claim in which jurisdiction under the Kansas Act was disputed, the Kansas Court of Appeals found respondent required Lang, in order to become employed, to complete orientation and paperwork, as well as a drug screen. The Court of Appeals in *Lang* found the foregoing activities were the last act necessary to complete Lang's contract of employment.

⁷ *Spears v. Sammons Trucking*, 35 Kan. App. 2d 132, 129 P.3d 984 (2006); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 51 (2000).

⁸ R.H. Trans., Cl. Ex. 1 at 2.

⁹ *Lang v. Leggett & Platt, Inc.*, No. 104,243, 2011 WL 1377089 (Kansas Court of Appeals unpublished opinion filed Apr. 2, 2011, rev. denied Jan. 20, 2012).

Lang is analogous to this claim. Claimant's contract of employment was not formed until claimant reported to work on December 20, 2007, and completed the required tasks enumerated in the December 13, 2007 letter. Claimant's accidental injury occurred before her contract of employment was formed.

Even if it is assumed that a contract of employment was formed before claimant's slip and fall, the accidental injury did not occur in the course of her employment. Although claimant's reason for reporting to the hospital on December 19, 2007, was not personal in nature and may have benefitted respondent, the fact remains that claimant had been clearly instructed the date, time and location she was to report to respondent's facility and what additional steps claimant was required to complete. Moreover, the December 13, 2007 letter explicitly states claimant's hire date was December 20, 2007.

Contrary to the ALJ's findings, claimant did not have the permission from her supervisor, Jim, to report to work a day early. Claimant talked to no supervisory or management personnel about coming to the hospital before December 20, 2007. The undisputed evidence establishes the only person with whom claimant spoke before going to CKMC was Lacy, an employee of respondent with no supervisory authority. There is no evidence claimant expected to be paid for her presence at the hospital on December 19th, nor was there evidence claimant intended to "clock in."

The ALJ relied on provisions of the Code of Federal Regulations apparently promulgated under the Fair Labor Standards Act. However, no authority is cited making the Fair Labor Standards Act, or the regulations thereunder, applicable to the issues in this Kansas Workers Compensation claim. This claim is governed by the Kansas Workers Compensation Act, not by any provisions of federal law.

CONCLUSIONS OF LAW

1. Claimant's accidental injury did not occur within the course of her employment with respondent.

2. The relationship of employer/employee did not exist between respondent and claimant when claimant's accidental injury occurred.

Given the Board's findings and conclusions, the remaining issues will not be addressed.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does contain a fee agreement between claimant and her attorney.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Brad E. Avery dated October 5, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant,
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Brad E. Avery, ALJ

¹⁰ K.S.A. 2007 Supp. 44-555c(k).